1987

Celia Anderson v. American Society of Plastic and Reconstructive Surgeons, Dr. Robert Goldwyn : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

CELIA ANDERSON,

Appellant,

vs.

AMERICAN SOCIETY OF PLASTIC AND RECONSTRUCTIVE SURGEONS, and DR. ROBERT GOLDWYN,

Respondents.

Case No. 870421

Case Priority No. 14(b)

BRIEF OF RESPONDENTS AMERICAN SOCIETY OF PLASTIC AND RECONSTRUCTIVE SURGEONS AND DR. ROBERT GOLDWYN

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE LEONARD H. RUSSON, DISTRICT JUDGE

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LIST OF ALL PARTIES

In addition to the parties listed in the caption, the following defendants did not challenge the lower Court's jurisdiction: (1) Broadbent & Woolf, Inc ; (2) Robert M. Woolf; and (3) Dow Corning Corporation. Broadbent & Woolf, Inc. and Dr. Robert M. Woolf are represented by P. Keith Nelson of Richards, Brandt, Miller & Nelson, 50 South Main Street, Suite 700, Salt Lake City, Utah 84144, and Dow Corning Corporation is represented by Ray R. Christensen of Christensen, Jensen & Powell, P.C., 510 Clark Leaming Center, 175 South West Temple, Salt Lake City, Utah 84101.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATEMENT OF ISSUES PRESENTED ON APPEAL

I. Whether this Court may assume the correctness of the judgment below, where, as here, Anderson failed to factually support her contentions on appeal with citations to the Record?

II. Whether the lower court properly dismissed appellant Celia Anderson's ("Anderson") claims against respondents American Society of Plastic and Reconstructive Surgeons, Inc.

("ASPRS") and Robert M. Goldwyn, M.D. ("Dr. Goldwyn") for lack of in personam jurisdiction because:

A. ASPRS and Dr. Goldwyn do not have sufficient minimum contacts with the State of Utah to satisfy the Utah Long-arm Statute; and

B. Assertion of In Personam jurisdiction over ASPRS and Dr. Goldwyn would violate the due process clause of the fourteenth amendment to the United States Constitution?

DETERMINATIVE STATUTES

The statutory provisions relevant to a determinative resolution of the present case are (1) Utah Code Ann. § 78-27-24 (1987); (2) Utah Code Ann. § 78-14-5 (1987); and (3) Utah Code Ann. § 78-27-22.

STATEMENT OF THE CASE

Nature of the Case

This appeal arises out of an action to recover damages for personal injuries allegedly suffered as a result of Celia Anderson's voluntary participation in a Silicone Injection Study, involving the use of MDX 4-4011, a sterile injectable silicone fluid for soft tissue augmentation.

Course of Proceedings Below

On September 25, 1987, the district court granted respondents' Motions to Quash Service of Process and to Dismiss Plaintiffs' Complaint because respondents ASPRS and Dr. Goldwyn (1) "did not have sufficient contact with the State of Utah or plaintiff sufficient to satisfy the minimum contact requirement for assertion of in personam jurisdiction. . . ;" and (2) "To assert in personam jurisdiction over [respondents] under the circumstances of this case would constitute a violation of constitutional due process." (Record at 1733, 1739-41, 1750.) See Order of Dismissal, attached hereto as Addendum "A."

On October 22, 1987, Celia Anderson filed notice of appeal, seeking review of the lower court's Order of Dismissal. (Record at 1747.)

Statement of the Facts

A. Jurisdictional Facts Relative to Dr. Goldwyn.

Dr. Goldwyn is a medical doctor, specializing in plastic and reconstructive surgery and is licensed to practice medicine in the State of Massachusetts. (Record at 1466 and Affidavit of Dr. Goldwyn ("Goldwyn Affidavit") at ¶ 2, attached hereto as Addendum "B.")

Dr. Goldwyn acts as medical monitor for a Silicone Injection Study. (Record at 1810 and Deposition of Robert M. Goldwyn, M.D. ("Goldwyn Depo.") at 5:5-10.)

Dr. Goldwyn's role as medical monitor for the Silicone Injection Study is limited to screening potential patients' medical information to determine from such information whether the patients comport with FDA guidelines for acceptance into the Study. (Record at 1466-67, 1810; Goldwyn Depo. at 5:11-22, 30-33; and Goldwyn Affidavit at ¶ 6-7.)

Based on medical information sent from Anderson's physician to Dr. Goldwyn in Massachusetts, Dr. Goldwyn gave approval for Anderson's voluntary entry into the Silicone Injection Study. (Record at 1466-67, 1810; Goldwyn Depo. at 39-40 and Goldwyn Affidavit at ¶¶ 6-7.)

Dr. Goldwyn was not Anderson's physician and did not provide her any medical treatment or service. Dr. Goldwyn's role in plaintiff's entry in the Silicone Injection Study was strictly limited to review of medical information unilaterally provided by plaintiff's physician. (Record at 1467 and Goldwyn Affidavit at ¶ 7.)

Dr. Goldwyn's review of Anderson's medical information was conducted in Massachusetts and Dr. Goldwyn has never seen or communicated with Anderson. Anderson never heard of Dr. Goldwyn until after this action was filed. (Record at 1624.) Anderson litigated this case against "a person she had never heard of." Id.

Dr. Goldwyn is a resident of Brookline, Massachusetts. (Record at 1466 and Goldwyn Affidavit at ¶ 1.) He has never been licensed to practice medicine in Utah. He has never advertised, maintained an office or otherwise transacted any business or practiced any medicine in the State of Utah. Dr. Goldwyn does not own, use or possess any real property situated in Utah. (Record at 1466 and Goldwyn Affidavit at ¶ 5.)

Dr. Goldwyn is not employed as a medical doctor for the American Society of Plastic and Reconstructive Surgeons. (Record at 1466 and Goldwyn Affidavit at ¶ 3.)

Dr. Goldwyn is not a medical doctor, agent, employee or representative of or for the Dow Corning Corporation ("Dow"). Id. at ¶ 4.

Dr. Goldwyn has not played any part in the development and use of MDX4-4011 injectable silicone, except for performing the limited function of approving patients' voluntary enrollment in the Study according to FDA guidelines. (Record at 1810 and Goldwyn Depo. at p. 5:11-18.)

Dr. Goldwyn's contacts, if any, with Utah and Anderson arise out of the unilateral act of Anderson's physician, who forwarded medical information to Dr. Goldwyn in Massachusetts. Dr. Goldwyn also engaged in limited correspondence to Anderson's physician. (Record at 1466-67 and Goldwyn Affidavit at ¶¶ 3-7.)

B. Jurisdictional Facts Relative to ASPRS:

ASPRS is an Illinois not-for-profit corporation, exempt from federal income taxation pursuant to Section 501(c)(6) of the Internal Revenue Code (Record at 1444 and Affidavit of Thomas R. Schedler,("Schedler Affidavit") at ¶ 2, attached hereto as Addendum "C.")

ASPRS is not qualified to do business in Utah, has no office or employee in Utah and has no agent for acceptance of service of process in Utah. (Record at 1444 and Schedler Affidavit at ¶ 3.)

ASPRS has not contracted to supply services or goods in the State of Utah, has no telephone listing in Utah, has no bank account in Utah, and does not own, use or possess any real estate situated in Utah. Id.

ASPRS does not and cannot practice medicine in Utah or in any state. (Record at 1444 and Schedler Affidavit at ¶ 4.)

ASPRS does not manufacture, sell or distribute MDX4-4011 or any drug or device in the State of Utah or any state and did not draft or distribute the consent form for participation in the MDX 4-4011 Silicone Injection Study. Id.

For at least the past 10 years, ASPRS has not conducted any educational symposia or seminars in Utah. (Record at 1445 and Schedler Affidavit at ¶ 9.)

ASPRS is a voluntary membership association of approximately 2,600 plastic surgeons practicing in the United States and Canada; approximately 30 active members reside in Utah. (Record at 1444-45 and Schedler Affidavit at ¶¶ 5-7.)

The ASPRS membership meets once a year. The ASPRS annual meeting has never been held in the State of Utah. Id.

ASPRS is governed by a twenty-one member Board of Directors, none of whom reside in Utah. (Record at 1446 and Schedler Affidavit at ¶ 14.)

SUMMARY OF THE ARGUMENT

The correctness of the lower court's decision to quash service of process and dismiss Anderson's claims against Dr. Goldwyn and ASPRS for lack of in personam jurisdiction should be assumed correct because Anderson failed to support her factual contentions on appeal with any specific citations to the record. Indeed, the few citations to the record upon which Andersen purports to rely are extrapolation or mischaracterization.

The Utah forum has no in personam jurisdiction over Dr. Goldwyn and ASPRS because: (1) respondents have not engaged in any of the activities enumerated by the Utah Long-arm Statute; and (2) respondents do not have any meaningful minimum contacts or relationships with the State of Utah or Anderson. Any contacts that may exist between respondents and

this forum are too random and attenuated to constitutionally support assertion of in personam jurisdiction.

ARGUMENT

POINT I

THIS COURT SHOULD ASSUME THE CORRECTNESS OF THE JUDGMENT BELOW BECAUSE ANDERSON FAILED TO REFER TO THE RECORD TO FACTUALLY SUPPORT HER CONTENTIONS ON APPEAL.

This Court has consistently held that it will assume the correctness of the judgment below, where, as here, an appellant does not properly support facts set forth in her brief with citations to the Record. Trees v. Lewis, 738 P.2d 612, 613 (Utah 1987) and State v. Tucker, 657 P.2d 755, 756-57 (Utah 1982). In Trees, this Court declared that it:

> will assume the correctness of the judgment below where counsel on appeal does not comply with the requirements of Rule 75(p)(2)(2)(d), Utah Rules of Civil Procedure, as to making a concise statement of facts and citations of the pages in the record where they are supported. (Citations omitted).[1]

In Trees, the fact statement in the appellant's Brief referred to documents by their exhibit numbers, but contained no citations to the Record. Occasional references to the record

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[1]Rule 24(a)(6), Rules of the Utah Supreme Court, which became effective in April 1987, ultimately replaced former Utah Rule of Civil Procedure 75(p)(2)(2)(d), but did not alter the requirement that citations to the record to support the fact statement in the Briefs. See Trees, 738 P.2d at 613, n.3.

appeared in the Argument section of the Brief. Trees, 738 P.2d at 612, n.2.

Similarly, in State v. Tucker, 657 P.2d 755, 756-57 (Utah 1982), this Court concluded that:

> A separate and independent basis for the affirmance of the trial court is that the defendant failed to refer to any portion of the record that factually supports his contention on appeal.

In the instant case, despite references to exhibits and affidavits contained in the Record, Anderson makes only occasional extrapolated references to the Record to support her factual contentions. In many instances, as set forth in detail below, there is no reference to any source other than Anderson's own opinion or mere allegation. Accordingly, this Court should assume the correctness of the judgment below and may affirm the lower court's judgment on this independent basis.

POINT II

UTAH COURTS LACK IN PERSONAM JURISDICTION OVER DR. GOLDWYN AND ASPRS.

The outermost reaches of amenability to in personam jurisdiction are governed by the law of the forum state, as limited under the due process clause of the fourteenth amendment to the United States Constitution. Mallory Engineering, Inc. v. Ted R. Brown & Assoc., 618 P.2d 1004, 1008 (Utah 1980). See also Utah Code Ann. § 78-27-22 (1987).

Utah law, as limited by due process only allows assertion of in personam jurisdiction over an out-of-state defendant when two conditions are satisfied: First, a defendant, through significant minimum contacts with the forum, must purposefully avail himself of the privileges of conducting activities in the forum. Abbott GM Diesel, Inc. v. Piper Aircraft Corp., 578 P.2d 850, 854 (Utah 1978). Second, such minimum contacts must not only satisfy statutory requirements, but also must make the exercise of jurisdiction comport with constitutional and "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); and Burt Drilling, Inc., v. Porta Drill, 608 P.2d 244, 247 (1980).

The plaintiff has the burden of demonstrating that a defendant is subject to the jurisdiction of Utah courts. See Union Ski Co. v. Union Plastics Corp., 548 P.2d 1257, 1259 (Utah 1976); and Segil v. Gloria Marshall Mgt. Co., 568 F. Supp. 915, 917 (D. Utah 1983). With respect to jurisdictional determinations, this Court cautioned that:

> plaintiff must show that his claim arises out of some contact defendant has with the forum state, some action undertaken by defendant by which it can be shown that defendant has "purposefully availed himself of the privilege of conducting activities within the forum state."

Roskelly & Co. v. Lerco, Inc., 610 P.2d 1307, 1311 (Utah 1980), quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958). Once a

jurisdictional determination has been made, this Court will presume its correctness:

> we [The Utah Supreme Court] indulge the presumption of verity and correctness of the trial court's determination and do not disturb it unless the plaintiff has shown that it was in error.

Union Ski Co., 548 P.2d at 1259. See also Cate Rental Co. v. Wahlen & Co., 549 P.2d 707 (Utah 1976).

In summary, in order to satisfy Anderson's evidentiary burden, she must have demonstrated, by competent evidence, that not only the statutory requirements of Utah Code Ann. § 78-27-24 have been met, but also that the quality and nature of respondents' activities are such that it is reasonable and fair to require them to conduct their defense in this state. Mallory Engineering, Inc. v. Brown, 618 P.2d 1004, 1008 (Utah 1980). Having failed to satisfy this evidentiary burden in the trial court, this Court will presume the correctness of the lower court's Ruling that Utah has no jurisdiction over respondents.

Anderson cannot rest on mere allegations to establish error in the lower court. In Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983), this Court held that "mere assertions without proper evidentiary foundation" are insufficient to preclude granting of a dispositive motion. Likewise, in Thornock v. Cook, 604 P.2d 934, 936 (Utah 1979), this Court stated that a plaintiff must "set forth specific facts showing that there is a genuine issue for trial."

In the instant case, Anderson failed to make any such evidentiary showing. Indeed, the essentially undisputed evidence demonstrates that ASPRS and Dr. Goldwyn have not purposefully availed themselves of the privileges of conducting any activities in Utah. (Record at 1444-46 and 1466-67.) Moreover, the evidence is clear that the quality and nature of respondents' activities within this state, if any, fail to satisfy constitutional "notions of fair play and substantial justice" for assertion of in personam jurisdiction in Utah.

A. ASPRS and Dr. Goldwyn Are Not Subject to In Personam Jurisdiction Under the Utah Long-Arm Statute.

Utah Code Ann. § 78-27-24 (1987) sets forth seven classes of activity (minimum contacts) which may render a nonresident subject to the jurisdiction of Utah courts under the Statute. Section 78-27-24 provides as follows:

> Any person . . . who in person or through an agent does any of the following enumerated acts, submits himself . . . to the jurisdiction of the courts of this state as to any claim arising from:
>
> (1) the transaction of any business within the state;
>
> (2) contracting to supply services or goods in this state;
>
> (3) the causing of any injury within this state whether tortious or by breach of warranty;
>
> (4) the ownership, use, or possession of any real estate situated in this area. . . .

Subparts (5), (6) and (7) of Section 78-27-24, relating to insurance, divorce and paternity actions, respectively, are not included as they clearly have no application in the instant appeal. As will be demonstrated, subparts (1) through (4) of Utah's Long-arm Statute are likewise inapplicable.

To establish statutorily required minimum contacts, "the defendant's conduct in connection with the forum state [must be] such that he should reasonably anticipate being haled into court there." World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). The Supreme Court's reasoning in Hanson v. Denkla, 357 U.S. 235, 253 (1958), explains when a defendant should not anticipate out of state litigation:

> The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. (Emphasis added.)

Assertion of jurisdiction is not proper unless "the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum state." Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), (quoting McGee v. International Life Insurance Co., 355 U.S. 220, 223 (1957)) (Emphasis in original). Thus, to support a

determination of in personam jurisdiction a defendant's contacts must not be "random," "fortuitous," or "attenuated." Hanson v. Denkla, 357 U.S. at 253.

In the instant case, there is no evidence that ASPRS or Dr. Goldwyn have transacted any business within the State of Utah (Subpart 1). (Record at 1444-46 and 1466-67.) Similarly, there is no evidence that respondents "contracted" to supply services or goods in the State of Utah (Subpart 2), or in any way purposefully availed themselves of the privileges and protections of conducting activities in this state. Id. It is undisputed that respondents do not own, use or possess any real estate situated in the State of Utah (Subpart 4). Although Anderson alleges that ASPRS and Dr. Goldwyn caused injury within this state, (Subpart 3), Anderson offers no specific evidence to support her allegation.

B. Dr. Goldwyn Does Not Have Sufficient Minimum Contacts With The State Of Utah To Be Subject To In Personam Jurisdiction.

1. There is no meaningful relationship between Dr. Goldwyn, the Utah forum and the instant litigation.

In Mallory Engineering, Inc. v. Ted R. Brown & Assoc., 618 P.2d 1004 (Utah 1980), this court noted that:

> [t]he central concern of this inquiry into personal jurisdiction is the relationship of the defendant, the forum, and the litigation, to each other.

Mallory, 618 P.2d at 1007. See also Kulko v. Superior Court of California, 436 U.S. 84, 91 (1978).

Dr. Goldwyn has never established any meaningful contact with Utah. (Recorded 1466-67 and Goldwyn Affidavit at ¶ 5.) He is not licensed to practice medicine nor has he practiced medicine in Utah. He has never advertised or maintained an office in Utah. Id. He has never owned property or otherwise transacted business in Utah. Id. Dr. Goldwyn has never even seen or communicated with Anderson. (Record at 1467 and 1624.)

Dr. Goldwyn has no relationship with the Anderson or the forum state, other than that which arose out of the unilateral acts of Anderson's physician, who forwarded medical information to Dr. Goldwyn in Massachusetts. Dr. Goldwyn's only other contact with this forum is limited to scant correspondence between Dr. Goldwyn and Dr. Woolf. (Record at 1467 and Goldwyn Affidavit at ¶ 7.) Such attenuated contact cannot satisfy the statutory requirement of "significant minimal contact with this state." See Hanson, 357 U.S. at 253 and Abbott, 578 P.2d at 854. If anything, Dr. Goldwyn's contact with plaintiff is best characterized as "random, fortuitous and attenuated." Id.

Critically, there has never been a doctor-patient relationship between Anderson and Dr. Goldwyn. Dr. Goldwyn testified:

> A. As a medical monitor, I have agreed with that diagnosis of lipodystrophy and would have admitted the patient to the study. That was my function, just to be able to make a judgment on those, but to conclude is a little strong.

Q. Why is it a little strong?

A. Because "conclude" implies a finality, and I always felt that, not examining a patient, I cannot make such a diagnosis, although it fit all the criteria of our study.

(Record at 1810.) Therefore, Dr. Goldwyn never diagnosed Anderson, but merely reviewed medical information in Massachusetts. Moreover, Anderson admits she never heard of Dr. Goldwyn prior to this litigation. (Record at 1124.) Under these circumstances Anderson's unsupported contention that "Goldwyn has had an ongoing interstate obligation and relationship with her for over ten years" is at best contradictory.

Finally, a detailed review of correspondence between Anderson's physician, Dr. Woolf and Dr. Goldwyn confirms that Dr. Goldwyn was only remotely informed as to Anderson's alleged medical complications. (Record at 1632, 1636, 1641, 1645 and 1650.) The correspondence does not contain advice, diagnosis or evidence of any treatment performed by Dr. Goldwyn because he was never Anderson's physician. The record simply reflects monitoring functions which were performed only in Massachusetts.

2. Dr. Goldwyn does not have sufficient contacts with Utah to satisfy jurisdictional requirements under Utah law.

Under circumstances where defendants have established more substantial contacts in Utah than Dr. Goldwyn, this Court has concluded that the Utah forum had no in personam jurisdiction.

For example, in Union Ski Company v. Union Plastics Corporation, 548 P.2d 1257 (Utah 1976), the out-of-state defendant contracted to manufacture ski boots in California and to supply them to the plaintiff for distribution and sale in Utah. During the course of dealings between the parties, the defendant's agents made at least four business visits to Utah.

On review, this Court refused to allow assertion of personal jurisdiction over the California defendant, stating that "[O]ur statute requires that the defendant has engaged in some substantial activity with some degree of continuity within this State." Union Ski, 548 P.2d at 1259, citing Hanks v. Administrator of the Estate of Jensen, 531 P.2d 363 (Utah 1974).

Similarly, in Cate Rental Co. Inc. v. Whalen & Co., 549 P.2d 707 (Utah 1976), a foreign corporation (1) engaged in leasing and purchasing equipment in Utah; (2) called the Utah corporation on an average of five times a year for a period of ten years; (3) shipped equipment and billed the foreign corporation which paid by mail; (4) transacted business by telephone; (5) and sent its president into Utah for negotiations. Under these circumstances, this Court held that the defendant foreign corporation still did not engage in sufficient activities within Utah to subject it to jurisdiction under the Utah Long-arm Statute and due process requirements. See Cate Rental, 549 P.2d at 708.

In the instant case, Dr. Goldwyn's only alleged jurisdictional contacts with Utah and Anderson arise out of: (1) review of Anderson's medical history in Massachusetts; (2) approval of Anderson's unilateral and voluntary application for entry in the Study, which approval was given in Massachusetts; (3) participation in drafting a consent form outside of Utah; (4) responsibility for a training program conducted in Ann Arbor, Michigan; and (5) limited monitoring related correspondence to Anderson's physician.

Anderson's contention that Goldwyn "knew . . . he would be approving silicone injection . . . in Utah is completely unsupported. Indeed, Dow Corning assumed the responsibility of organizing content and offering a basic format for the consent form, not Dr. Goldwyn. (Record at 1677.) Moreover there is no evidence to support the mere allegation that Dr. Goldwyn introduced the consent form in Utah. Under these facts, it cannot be said that Dr. Goldwyn "purposefully established 'minimum contacts' in the forum state," which is "the constitutional touchstone" of this determination. Burger King Corp. v. Rudzawiez, 471 U.S. 462, 474 (1985), quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The essentially undisputed evidence demonstrates, at most, only unintentional contact with Utah, insufficient to establish necessary minimum contacts in Utah. See Abbott, 578 P.2d at 854.

3. Dr. Goldwyn's assistance in drafting a consent form does not subject him to Utah jurisdiction.

Anderson argues that Dr. Goldwyn's assistance in drafting a consent form which was later introduced into this forum is sufficient basis to assert in personam jurisdiction over Dr. Goldwyn. This contention is flawed for two important reasons. First, Dr. Goldwyn did not purposefully introduce the consent form in Utah and the consent form was not the source of injury. Second, Anderson has failed to establish a duty on the part of Dr. Goldwyn to obtain informed consent from Anderson.

With respect to introduction of products in a foreign state, the United States Supreme Court explained in Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), that the item introduced in a foreign state must be (1) purposefully introduced in the state; and (2) the source of injury in order to make assertion of personal jurisdiction proper:

> Hence if sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other states, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owners or to others.

444 U.S. at 297 (emphasis added). In the instant case, Dr. Goldwyn did not "purposefully direct" any efforts toward the

introducing of a consent form in Utah, and the consent form was not the source of injury to Anderson.

Accordingly, Anderson's cited authorities are not applicable here. For example, in Jones Enterprises, Inc. v. Atlas Service Corporation, 442 F.2d 1136 (9th Cir. 1971), the Court held that assertion of jurisdiction was proper because the out-of-state defendant purposefully introduced a defective design in the forum state which caused a building to collapse. Similarly, the jurisdictional contact in Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984), arose out of the purposeful introduction of a libelous magazine into the forum state. Finally, the jurisdictional contact in Burt v. Board of Regents of the University of Nebraska, 757 F.2d 242 (10th Cir. 1985), was a libelous letter purposefully sent into Colorado.

In each case cited by plaintiff, the jurisdictional contact relied upon was some material that was (1) purposefully sent into the foreign jurisdiction and (2) the direct source of injury there. Here, there is absolutely no factual support for the allegation that Dr. Goldwyn introduced the consent form into Utah or that the consent form was the Anderson's source of injury. Indeed, Anderson alleges that it was the injection of silicone that resulted in her alleged injury. (Anderson's brief at p. 7.)

If Anderson's contention that mere assistance in drafting a consent form is sufficient to satisfy jurisdictional

and constitutional requirements anywhere the consent form is introduced, statutory and due process protections become a nullity. An extension of Anderson's argument would produce ludicrous and unfair results. Under Anderson's interpretation, attorneys, secretaries, printers or others who also participated in production of the consent form would likewise be subject to limitless assertion of jurisdiction, wherever the product of their labors is found. Such a result was clearly not intended by Utah's Long-arm Statute or the due process clause of the United States Constitution.

The consent form cannot be considered a jurisdictional contact for yet another reason. Under Utah law, a patient may not even recover damages from a health care provider in an action based upon the provider's failure to obtain informed consent unless she proves: "that a provider-patient relationship existed between the patient and health care provider; . . . and the health care provider rendered health care to the patient . . . ." Utah Code Ann. § 78-14-5(1)(a)-(b) (1987). See also Nixdorf v. Hicken, 612 P.2d 348, 354 (Utah 1980) (holding that the "relationship between a doctor and his patient creates a duty in the physician to disclose to his patient any material information.") (Emphasis added.)

Because there was never a doctor-patient relationship between Anderson and Dr. Goldwyn and Dr. Goldwyn never rendered health care to Anderson, there was no duty to obtain informed

consent. Thus, the issues of informed consent and participation in drafting a defective consent form are irrelevant.

4. Dr. Goldwyn did not render medical diagnosis or treatment for Anderson.

Plaintiff's cause of action against Dr. Goldwyn arises out of limited monitoring activities which occurred only in Massachusetts and bore no relationship to Utah. In interpreting the breadth and scope of the due process clause in similar cases regarding assertion of in personam jurisdiction over physicians, several courts have held that a patient may not consider an alleged tort to be committed wherever the consequences foreseeably may be felt. Wright v. Yackley, 459 F.2d 287, 289-90 (9th Cir. 1972).

In Wright, the court held that the fact that a doctor was on notice that the consequences of his South Dakota services would be felt in Idaho was not sufficient to make the doctor amenable to suit in Idaho under that State's Long-arm Statute. The opinion states as follows:

> In the case of personal services, focus must be on the place where the services are rendered, since this is the place of the receivers (here the patient's need). . . . [T]he idea that tortuous rendition of such services is a portable tort which can be deemed to have been committed wherever the consequences foreseeably were felt is wholly inconsistent with the public interest in having services of this sort generally available.

459 F.2d at 289-90.

Similarly, in Gelineau v. New York University Hospital, 375 F. Supp. 661 (D.N.J. 1974), the plaintiff, a New Jersey resident sued in New Jersey on the basis of treatment in a New York Hospital. The court concluded that:

> [T]he residence of a recipient of personal services rendered elsewhere is irrelevant and totally incidental to the benefits provided by the defendant at his own location.

375 F. Supp. at 667. Other jurisdictions likewise acknowledge the impropriety of asserting in personam jurisdiction over non-resident physicians under similar circumstances.[2]

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[2]See Lemke v. St. Margaret Hospital, 552 F. Supp. 833 (E.D. Ill. 1982 (an Indiana doctor who treated an Illinois patient was not subject to long arm jurisdiction in Illinois solely because his care in Indiana allegedly produced tortious injury in Illinois); Kennedy v. Zeismann, 526 F. Supp. 1328 (E.D. Ky. 1981) (an Ohio doctor who treated Kentucky patient in Ohio and who maintained a telephone listing in Kentucky, but who did not otherwise advertise or solicit in Kentucky, was not subject to jurisdiction of a Kentucky court in a malpractice suit); Cook v. Searle, 475 F. Supp. 1166 (S.D. Iowa 1979) (Colorado doctors who prescribed plaintiff's use of a contraceptive device while plaintiff was a student in Colorado, were not subject to suit in Iowa where plaintiff resided when the injury allegedly occurred); Glover v. Wagner, 462 F. Supp. 308 (D. Neb. 1978) (where doctor's administration of chemotherapy was localized and confined to Iowa, there were insufficient contacts with Nebraska for the application of Nebraska's long-arm statute notwithstanding the foreseeability of alleged effects occurring in Nebraska); Kailieha v. Hayes, 536 P.2d 568 (Hawaii 1975) (a Virginia physician who prescribed medication for a visiting Hawaii resident was not subject to long-arm jurisdiction in Hawaii when following her return, the patient lost consciousness while driving her car and collided with plaintiff.)

Because Anderson sought monitoring ervices abroad, she may not consider a tort to be committed wherever the consequences foreseeably were felt. Anderson's medical information was unilaterally forwarded to Dr. Goldwyn in Massachusetts. Thus, for all intents and purposes, any act of Dr. Goldwyn took place only in Massachusetts and bore no relation to Utah.

Nevertheless, Anderson contends that assertion of jurisdiction over a doctor is appropriate if the doctor diagnoses a patient via telephone or by mail, while the patient is in his or her own state of residence. Again, plaintiff's supporting case authorities are inapplicable to the instant case because Dr. Goldwyn did not diagnose or treat Anderson. (Record at 1467 and Goldwyn Affidavit at ¶¶ 6-7.)

In McGhee v. Riekhof, 442 F. Supp. 1276 (D. Utah 1978), cited by Anderson, the ophthalmologist over whom the Montana court assumed jurisdiction had actually treated the patient/plaintiff in Utah, had maintained weekly telephone contact with the plaintiff, and had given medical advice concerning plaintiff's return to work which was the direct cause of injury to the plaintiff in Montana. Similarly, in S.R. v. City of Fairmont, 280 S.E.2d 712 (W. Va. 1981), cited by Anderson, the defendant medical corporation actually provided medical care for the patient/plaintiff and later failed to provide follow-up care in West Virginia where the defendant corporation derived direct economic benefits from business solicitations.

In summary, any function performed by Dr. Goldwyn was performed only in Massachusetts and such function was performed in response to the unilateral request of Anderson's physician. (Record at 1466-67 and Goldwyn Affidavit at ¶¶ 6-7). Dr. Goldwyn's argument that no doctor-patient or fiduciary relationship existed is buttressed by Anderson's own admissions that she had never heard of Dr. Goldwyn until she sued him. (Record at 1623.)

C. ASPRS Does Not Have Sufficient Minimum Contacts With the State of Utah to be Subject to In Personam Jurisdiction.

1. There is no meaningful relationship between ASPRS, the Utah forum and the instant litigation.

There is no relationship between ASPRS, this forum, and the instant litigation. It is unrefuted that ASPRS engages in no continuous activity in Utah (Addendum "B;" Anderson brief at 21, n. 3). ASPRS does not and cannot practice medicine in Utah or any state and therefore was not a clinical investigator and could not participate in the protocol at issue. ASPRS did not manufacture, sell or distribute MDX4-4011 or any drug or device in Utah, or any state. (Record at 1444-46.)

Thus, the "minimum contacts" alleged and relied on by Anderson in claiming jurisdiction over ASPRS relate solely to the ASPRS' gratuitous advisory role regarding certain aspects of the protocol for the clinical investigation of injectable

silicone. It is undisputed that none of these advisory activities occurred in Utah. Id. More importantly, none of these activities form a basis for jurisdiction over ASPRS in Utah.

2. No jurisdiction arises from allegations regarding ASPRS' participation in drafting the consent form.

Anderson alleged that ASPRS drafted a defective consent form which Anderson read in Utah, causing her to agree to treatment which injured her. Nevertheless, ASPRS established, through its Executive Director that it did not draft the consent form: "ASPRS . . . did not draft, prepare or distribute the consent form in issue". (Record at 1444 and Schedler Affidavit at ¶ 4.) Because this purported jurisdictional fact was properly challenged, Anderson continued to have the burden to come forward with proof of this jurisdictional fact by affidavit or otherwise. Union Ski Co., 548 P.2d at 1259. See also Dicesare-Engler Productions, Inc. v. Mainman Ltd., 81 F.R.D. 703 (W.D. Pa. 1979); and Buckeye Associates, Ltd. v. Fila Sports, Inc., 616 F. Supp. 1484 (D.C. Mass. 1985).

In response to this denial, Anderson submitted the deposition of Arthur Rathjen, Director of the Dow Corning Service to Medical Research, and specifically referred the Court to Page 102 of his Deposition. The specific testimony referred to reads as follows: "the ASPRS looked into the

subject of patient consent form." (Record at 1812 and Rathjen Deposition at 102. (Emphasis added.) From this testimony, Anderson concludes that ASPRS drafted the consent form and introduced it into this forum. Such a conclusion cannot satisfy Anderson's burden of proof or preclude dismissal of Anderson's claims. Webster, 675 P.2d at 1172.

During the same deposition Dow Corning clarified the consent form issue by referring to certain answers to interrogatories which were signed by Rathjen of Dow Corning. The interrogatories read as follows:

> **Q.** Identify the authors of the consent form which was allegedly signed by Plaintiff.
>
> **A.** The consent form was drafted by Arthur Rathjen, Director of Dow Corning Service to Medical Research, Harvey Steinberg, FDA Counsel, and Robert Goldwyn, the Medical Monitor.

(Record at 1812 and Rathjen Deposition at pp. 114-15). Mr. Rathjen was then asked whether this answer was still accurate, or whether he was revising his prior testimony. He stated as follows:

> My testimony has been the same right from the beginning, that it (the consent form) was prepared by Dr. Goldwyn and our legal counsel, and the drafting of the inform(ed) patient consent, when it was received from Dr. Goldwyn and the legal department, that I had it typed up. I did not prepare and I did not write the informed patient consent.

Id.

Additionally, Exhibits attached to Anderson's own Memorandum In Opposition to the ASPRS' Motion to Dismiss, contradict involvement by the ASPRS with the consent form. Exhibit B of plaintiff's brief contains the Dow Corning minutes of April 11, 1977. Paragraph E(1) of this Exhibit reads as follows:

> E. Subject of Patient Consent Form.
>
> 1. Dow Corning will assume responsibility of organizing content and offering a basic format.

(Record at 1677.)

In summary, ASPRS did not draft the consent form; and Responses to Anderson's Interrogatories, signed by Dow Corning confirm this fact. Finally Anderson's own Exhibits advance ASPRS's argument that it was not involved with drafting the consent form. In response, Anderson merely extrapolates portions of the deposition testimony of Arthur Rathjen and asks this Court to infer involvement by the ASPRS. Under these circumstances, Anderson has clearly not met her burden of proving this jurisdictional issue.

Moreover, even if this Court determined that Anderson created a fact issue regarding ASPRS' participation in drafting the consent form, this allegedly disputed fact is insufficient to establish jurisdiction.

Under Utah law, only the relationship between a doctor and patient creates a duty on the part of a physician to disclose

to the patient material information regarding risks and alternative treatment. Nixdorf, 612 P.2d at 354; and Utah Code Ann. § 78-14-5(1)(a) (1987). ASPRS is not a physician and cannot practice medicine. (Record at 1444.) ASPRS could not and did not have a "doctor-patient" relationship with Anderson. Regardless of issues of causation, ASPRS' alleged participation in drafting the form cannot establish liability under a theory of informed consent and cannot serve as a basis for jurisdiction under the Utah Long-Arm Statute. Therefore alleged "factual disputes" with regard to ASPRS' involvement in preparing the consent form are irrelevant.

Finally, Plaintiff's belated argument characterizing Plaintiff as a foreseeable third party expected to rely on the consent form is both untimely and without merit.[3]

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[3]Notably, plaintiff presents this theory for the first time in her Appellate Brief and even then devotes only a single sentence in a footnote to establishing her theory. Anderson purports to rely on Salt Lake City School Dist. v. Galbraith & Green, Inc., 740 P.2d 284 (Utah Ct. App. 1987), however this case deals with equitable indemnity. Because Anderson failed to raise this issue in the trial court, she cannot assert it for the first time on appeal. See Insley Manufacturing Corp. v. Draper Bank & Trust, 717 P.2d 1341, 1347 (Utah 1986). Moreover, in the instant case, Anderson fails to indentify the contract or agreement to which she was not a party and which forms the basis for the alleged theory of third party beneficiary recovery. In fact, no such contract exists. Accordingly, there is no basis for assertion of in personam jurisdiction over ASPRS based on a third party beneficiary theory. See Wasatch Bank of Pleasant Grove v. Surety Insurance Co. of California, 703 P.2d 298 (Utah 1985).

3. ASPRS did not contract to supply goods or services in Utah.

Anderson's assertion that ASPRS contracted to supply services (Dr. Woolf) is completely without factual support. Anderson failed to identify or plead the existence of a contract for services and, in fact, there is no legally contractual relationship betwen ASPRS and Dr. Woolf. Dr. Woolf is a resident of Utah, licensed to practice medicine therein, and free to practice his specialty.

ASPRS does not deny that, in its advisory capacity, it pre-screened the qualifications of potential clinical investigators for approval by Dow Corning and the FDA. The pre-screening process, however, merely consisted of checking qualifications of investigators based on FDA articulated criteria. There is no dispute whether Dr. Woolf met the criteria set forth by the FDA for participation as an investigator. In any event, the final choice was under the control of Dow Corning and the FDA in all cases. Exhibit A of Anderson's brief states as follows:

> 5. Selection of Treatment Team
>
> d. The FDA requires a complete curriculum vitae from every member of the Team for their evaluation and final approval.
>
> h. ISPAC (Injectable Silicone Program Advisory Committee) will select team. DCC (Dow Corning) reserves veto right.

(Record at 1671.)

Additionally, Exhibit B of Anderson's brief states:

> 4. g. Proposed list of ASPRS candidates will be assembled by silicone injection committee, but Dow Corning has the privilege of veto.

(Record at 1678.)

Finally, Exhibit C of Anderson's brief states:

> III. Proposed Candidates for Participation in Service IND
>
> Drs. Musgrave and Elliott have prepared and submitted a list of 21 candidates with two more to be identified (Hawaii and Phoenix, Arizona). Rathjen (Dow Corning) has taken the list to review and will get back to Musgrave with Dow Corning's recommendations on acceptance. Dr. Musgrave will then contact candidates for their curriculum vitae.

(Record at 1685.)

There is no basis for Anderson's assertion that by screening potential investigators, pursuant to objective criteria, ASPRS "contracted to supply services in the state of Utah." Accordingly, this alleged activity by the ASPR does not give rise to in personam jurisdiction under the Utah Long arm statute or the due process clause of the Constitution.

4. The contacts of Dow Corning with the forum are not imputed to ASPRS.

Plaintiff's final argument is that Dow and the ASPRS are joint venturers and therefore the contacts of Dow Corning are imputed to the ASPRS. In support of this proposition, Plaintiff cites Aigner v. Bell Helicopters, Inc., 86 F.R.D. 532, 540 (N.D. Ill. 1980). In Aigner, the court recited the

following as necessary elements for establishing the existence of a joint venture:

1. A relationship based on a contract (express or implied).

2. A community of interest in the purpose of the joint adventure.

3. The right of the parties to direct and govern the conduct of each other.

4. A proprietary interest in the subject matter.

5. Expectation of profits.

6. Sharing of profits.

7. Sharing of losses.

The Aigner Court conferred jurisdiction only after finding that "[t]he factual contentions set forth by the Plaintiffs . . . as supported by the evidentiary materials referred to therein . . .(were) sufficient to constitute at least a prima facie showing that each of the requisite joint venture elements was present in the . . . business relationship in question." Id. at 541. (Emphasis added).

Anderson claims that a "fact issue" exists. The record does not support this claim.

a) Dow and ASPRS did not have the right to direct and govern the conduct of each other.

Dow authored the protocol and ASPRS had no control over it. Although ASPRS was consulted regarding some aspects of the study, Dow (and the FDA) at all times retained veto power over recommendations made. The evidence proffered by Anderson in

support of its allegations of ASPRS "control" are various minutes of meetings between ASPRS and Dow (Anderson's Exhibits A-C, attached to Anderson Brief).[4] What is clear from Anderson's Exhibits is that ASPRS only acted as an advisor for some aspects of the Study. ASPRS did not control or participate in the investigations

Exhibit B to Anderson's brief (minutes by Dow Corning) states as follows:

> Dow or Corning is the recognized sponsor and must answer to the FDA, will take the initiative if study protocol is violated or abused by individual investigators.

(Record at 1677 and Anderson's Exhibit B, Section D(3)(d)(2).)

Most importantly, the Application to the FDA regarding MDX 4-4011 specifically list Dow Corning Corporation as the sole sponsor of the study. (Record at 1447-48) This fact further undermines Anderson's mischaracterization of ASPRS' advisory role.

b) There is no actual or implied contract between ASPRS and Dow

In alleging a joint venture, Anderson, in her brief, presumes the existence of a contract between Dow and ASPRS with

---

[4]It is the position of ASPRS that the minutes relied on by Anderson do not qualify as competent evidence absent foundation testimony. ASPRS' reference to these Exhibits is not intended to constitute a waiver of its standing objection to Anderson's reliance on these documents.

regard to the protocol. This presumption is apparently based on sections of minutes and proposed minutes of certain meetings between Dow and ASPRS. (See Anderson's brief at Exhibits A - C). These documents fail to establish any of the elements necessary for contract.

Although it is not disputed that ASPRS rendered advice to Dow with regard to certain aspects of the protocol, this fact does not constitute a contract between the parties. Indeed, ASPRS received no consideration for its involvement. The activities of ASPRS are more accurately characterized as a public service.

That the parties did not intend to be bound is further evidenced by Anderson's Exhibit "A" wherein it is stated "Dow Corning reserves the right to withdraw from the program if untoward expense is noted." (Record at 1669-73.)

Moreover, it is not even alleged that the so-called implied contract between ASPRS and Dow contemplated expectation of profits nor sharing of profits and losses. Without these essential elements, there can be no finding of a joint venture.

c) The Record is devoid of evidence that ASPRS had a proprietary interest in the subject matter, that it had an expectation of profits, or that it shared profits and losses with Dow.

In Basset v. Baker, 530 P.2d 1,2 (Utah 1974), the Utah Supreme Court defined a joint venture as "an agreement between

two or more persons ordinarily, but not necessarily limited to a single transaction for the purpose of making a profit." (Emphasis added). It is undisputed that ASPRS did not intend to (and did not) make a profit as a result of its gratuitous advice. Indeed, ASPRS is a not-for-profit voluntary medical association. (Record at 1444.) Moreover, it is undisputed that ASPRS had no expectation of profit, and did not share profits or losses with Dow.[5] Accordingly, on this basis alone, there is no issue as to whether ASPRS can be considered a joint venturer.

The burden of establishing jurisdictional facts is on Anderson. Fidelity and Casualty Co. of N.Y. v. Philadelphia Resins, 766 F.2d 440 (10th Cir. 1985). She is not entitled to rely on mere allegations without proper evidentiary foundation. Thornock, 604 P.2d at 936.

In this regard, Anderson has had ample opportunity to conduct discovery on the jurisdictional question and remains without any competent evidence to support her jurisdictional claim. Accordingly, ASPRS should be dismissed from this

---

[5]Dow did not have an expectation of profit. Exhibit A to Anderson's brief (ASPRS minutes of 4/18/77) states: "...DCC (Dow Corning) would like to develop a program that would make the fluid available on a limited, non-profit basis for the treatment of a defined group of patients with severe defects where other therapeutic methods did not appear adequate."

lawsuit at this juncture. Saraceno v. S. C. Johnson & Son, Inc., 83 F.R.D. 65 (D.C. N.Y., 1979).

POINT III

ASSERTION OF IN PERSONAM JURISDICTION OVER RESPONDENTS WOULD VIOLATE CONSTITUTIONAL DUE PROCESS.

In addition to satisfying the minimum contacts requirements of Utah's Long Arm Statute, the constitutional requirements of due process must also be satisfied before jurisdiction may be asserted over a non-resident defendant. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Burt Drilling, Inc. v. Portadrill, 608 P.2d 247 (Utah 1980). In Burt Drilling, this Court stated that:

> [a]fter determining that Section 78-27-24 . . . has been satisfied, the remaining question is whether it is consistent with our traditional notions of fair play and substantial justice to require defendant to defend this action in our courts. (Citations omitted.)

Burt Drilling, 608 P.2d at 247.

The United States Supreme Court stated that certain factors may be considered to determine whether the assertion of personal jurisdiction fails to comport with "fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945). The factors listed by the Court included among others: a defendant's purposeful activity in the forum, the forum state's interest in adjudicating the dispute, the burdens on the defendant, and the shared interests

of the several states in furthering fundamental, substantive social policy. See also Burger King, 105 S. Ct. at 2184 and Worldwide Volkswagen Corp., 444 U.S. at 292.

A. ASPRS And Dr. Goldwyn Did Not Engage In Purposeful Activities In Utah.

The United States Supreme Court stresses "fair warning" and "foreseeability" as important factors in evaluating "minimum contacts" and determining "fair play and substantial justice." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) (citations omitted).

The Supreme Court of this State has also consistently held that in order for a nonresident defendant to become subject to the jurisdiction of the Utah courts, there must have been some intentional and purposeful activity of such defendant in the State of Utah by which he takes advantage of the benefit and protection of its laws, and is further obliged reciprocally to submit to its remedies. In Hanks v. Administrator of Estate of Jensen, 531 P.2d 363 (Utah 1974), while acknowledging that the Utah Long-arm Statute is applied to the fullest extent permitted by the due process clause, this Court clarified that:

> It is nonetheless true that our courts cannot take jurisdiction over a resident of another state simply for the convenience or desire of the plaintiff. The rationale of statutes and the decisional law in the trend toward extending jurisdiction over foreign residents is that there must be some intentional and purposeful activity of the defendant in the forum state by which he takes advantage of the benefits and

> protections of its laws, and is obliged reciprocally to submit to its remedies. (Emphasis added.)

Hanks, 531 P.2d at 364.

In the instant action, there is no purposefully established relationship between the respondents and this forum. Since the controversy cannot relate to activities in the forum state, significant contacts of a "continuous and systematic nature" must be asserted to support jurisdiction. Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984); Abbott G.M. Diesel, Inc. v. Piper Aircraft Corp., 578 P.2d 850 (Utah, 1978). Respondents do not engage in any continuous or systematic activity in Utah. In fact, their contacts with Utah, if any, are so sporadic and so minimal, that it is in no way reasonable for them to anticipate being brought to court here. (Record at 1444-46 and 1466-67.)

B. ASPRS And Dr. Goldwyn Could Not Reasonably Anticipate Being Haled Into Court In Utah.

The United States Supreme Court has noted that "[t]he due process clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties or relations.'" International Shoe Co. v. Washington, 326 U.S. at 319. See also Burger King Corporation v. Rudzewicz, 471 U.S. 462 (1985). The United States Supreme Court also stated that "the foreseeability that is critical to due process analysis . . .

is that the defendant's conduct in connection with the forum state [is] such that he should reasonably anticipate being haled into court there." Worldwide Volkswagen, 444 U.S. at 297.

The only conceivable relationship between ASPRS and the State of Utah arises from the fact that out of approximately 2,600 active members of the Society, 30 members reside in this State (Record at 1445 and Schedler Affidavit at ¶ 7.) The controversy in this case does not stem from any activities relating to ASPRS membership. The presence of in-state membership in an out-of-state organization is not a sufficient basis upon which to base an assertion of jurisdiction over the organization. Szabo v. Medical Information Bureau, 127 Cal. App.3d 51, 179 Cal. Rptr. 368 (1981); Elizabeth Hospital, Inc. v. Richardson, 167 F. Supp. 155 (W.D. Ark. 1958), aff'd, 269 F.2d 167 (8th Cir.), cert. denied, 361 U.S. 884 (1959). Indeed, to hold otherwise would be tantamount to finding jurisdiction over a foreign corporation merely because it has shareholders who reside here. Case authority clearly forbids such a holding. See, e.g., Oostdyk v. British Airtours, Ltd., 424 F. Supp. 807 (S.D.N.Y. 1976).

Dr. Goldwyn's only relationship and the State of Utah is an attenuated monitoring function and limited correspondence with Dr. Woolf arising out of either Anderson or her physician's unilateral acts. Exercise of Long-arm jurisdiction under these circumstances cannot comport with due process. Such attenuated

contacts with Utah have been consistently held insufficient for assertion of in personam jurisdiction. See Union Ski Co. v. Union Plastic's Corp., 548 P.2d 1257 (Utah 1976); and Cate Rental Co. v. Whalen & Co., 549 P.2d 707 (Utah 1976).

In summary, ASPRS and Dr. Goldwyn have not purposefully engaged in any activity or conduct in this State and do not have sufficient contacts with the State of Utah to reasonably anticipate being haled into a Utah court under the Utah Long-arm Statute or applicable Utah law.

C. Assertion Of Jurisdiction Over ASPRS And Dr. Goldwyn Would Violate Social Policy.

There is an important public policy, favoring exchange and development of new medical technology and treatment. This public policy encourages widespread dissemination of technology, programs and medications in order to improve the health and welfare of our society. Many of the programs and studies that achieve these policy considerations are introduced into all or many of the United States. If those who participate on a limited basis in the furtherance of such programs are subjected to unlimited jurisdiction throughout the United States, it is inevitable that there will be a chilling effect on sharing medical advances.

To avoid this undesirable result and give full force to the constitutional limitations on assertion of in personam jurisdiction, the lower court's determination that "[t]o assert in

personam jurisdiction over [ASPRS and Dr. Goldwyn] under the circumstances of this case would constitute a violation of constitutional due process" must be affirmed. (Record at 1740.)

Respondents' liberty interests in not being subject to the binding judgment of a forum with which they have established no meaningful contacts, ties, or relations would be severely violated in the instant case if a jurisdictional finding were made. It would also be unrealistic to suggest that respondents should reasonably anticipate being haled into Utah's courts when they have done nothing to avail themselves of the benefits and protections of Utah and have not engaged in any significant activity in Utah.

CONCLUSION

For all of the foregoing reasons, Respondents submit that in personam jurisdiction in the State of Utah is lacking. Accordingly, ASPRS and Dr. Goldwyn respectfully requests this Court to affirm the lower court's Order of Dismissal.

Respectfully submitted,

SNOW, CHRISTENSEN & MARTINEAU

By Larry R. Laycock
Elliott J. Williams
Larry R. Laycock

SCMLRL120

A D D E N D U M

TABLE OF CONTENTS

ADDENDUM "A"

ELLIOTT J. WILLIAMS (A3483)
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Accounting

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

CELIA ANDERSON,

Plaintiff,

vs.

BROADBENT & WOOLF, INC., a Utah corporation, ROBERT M. WOOLF, individually, DOW CORNING CORPORATION, ROBERT GOLDWYN, an indivual, and THE AMERICAN SOCIETY OF PLASTIC AND RECONSTRUCTIVE SURGEONS,

Defendants.

ORDER OF DISMISSAL

Case No. C-83-7367

Judge Leonard H. Russon

Defendants American Society of Plastic and Reconstructive Surgeons ("ASPRS") and Dr. Robert M. Goldwyn's Motions to Quash Service of Process and for Dismissal of Plaintiff's Complaint in the above-captioned matter came on regularly for hearing before the above-entitled court on September 25, 1987 in a special setting at the hour of 9:00 a.m.; Elliott J. Williams and

Larry R. Laycock of Snow, Christensen & Martineau appeared on behalf of defendants ASPRS and Robert M. Goldwyn, M.D. and Dan Bertch appeared on behalf of plaintiff Celia Anderson, and the court having heard oral argument, reviewed the pleadings and memoranda filed herein, and being fully apprised in the premises hereby finds:

1. Defendant Robert M. Goldwyn, M.D., did not have contacts with the State of Utah or plaintiff sufficient to satisfy the minimum contacts requirement for assertion of in personam jurisdiction pursuant to the Utah Long-Arm Statute (Utah Code Ann. § 78-27-24 (Supp. 1987)).

2. To assert in personam jurisdiction over Dr. Goldwyn under the circumstances of this case would constitute a violation of constitutional due process.

3. Dr. Goldwyn's motion for dismissal and to quash service of process should be granted on all of the grounds listed in the memoranda submitted by Dr. Goldwyn.

4. Defendant ASPRS did not have contacts with the State of Utah or plaintiff sufficient to satisfy the minimum contacts requirement for assertion of in personam jurisdiction pursuant to the Utah Long-Arm Statute (Utah Code Ann. § 78-27-24 (Supp. 1987)).

5. To assert in personam jurisdiction over ASPRS under the circumstances of this case would constitute a violation of constitutional due process.

6. ASPRS' motion for dismissal and to quash service of process should be granted on all of the grounds cited in the memorada submitted by ASPRS.

7. The court finds that there is no just reason for delay and entry of judgment should be expressly directed as provided in Rule 54(b), Utah Rules of Civil Procedure.

NOW, THEREFORE, BASED UPON THE FOREGOING AND GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED:

1. Defendants ASPRS and Dr. Robert M. Goldwyn's motions for dismissal and to quash service of process be and the same are hereby granted and the plaintiff's claims against said defendants are dismissed and service of process upon them is quashed for the reason the courts of the State of Utah lack personal jurisdiction over them.

2. There is no just reason for delay and entry of this Order as a final judgment is hereby expressly directed pursuant to Rule 54(b), Utah Rules of Civil Procedure.

DATED this 19th day of October, 1987.

BY THE COURT:

Leonard H. Russon
District Court Judge

ATTEST
H. DIXON HINT
Clerk
By

AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

SHAUNA JENSEN, being duly sworn, says that she is employed in the law offices of Snow, Christensen & Martineau, attorneys for Defendants ASPRS and Robert M. Goldwyn, M.D. herein, that she served the attached Order of Dismissal (unsigned)

_____

_____ (Case No.) C-83-7367 upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Dan Bertch, Esq.
Robert J. DeBry & Associates
4001 South 700 East, Suite 501
Salt Lake City, Utah 84107

P. Keith Nelson, Esq.
Richards, Brandt, Miller & Nelson
50 South Main Street, Suite 700
Salt Lake City, Utah 84144

Ray R. Christensen, Esq.
Christensen, Jensen & Powell
510 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101

and causing the same to be mailed first class, postage prepaid, on the 7th day of October, 1987.

Shauna Jensen
SHAUNA JENSEN

SUBSCRIBED AND SWORN to before me this 7th day of October, 1987.

Nancy D. Hughes
NOTARY PUBLIC

My Commission Expires:

1/22/91

ADDENDUM "B"

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

CELIA ANDERSON,

Plaintiff,

vs.

BROADBENT & WOOLF, INC., a Utah corporation, ROBERT M. WOOLF, individually, DOW CORNING CORPORATION, ROBERT GOLDWYN, an individual, and THE AMERICAN SOCIETY OF PLASTIC AND RECONSTRUCTIVE SURGEONS,

Defendants.

AFFIDAVIT OF ROBERT M. GOLDWYN, M.D.

Case No. C 83-7367

Judge Leonard H. Russon

STATE OF MASSACHUSETTS)
:ss.
COUNTY OF _____)

DR. ROBERT M. GOLDWYN, being first duly sworn upon oath, deposes and states the following upon his own personal knowledge and information:

I am a resident of Brookline, Massachusetts, and am over 21 years of age.

2. I am a medical doctor specializing in plastic and reconstructive surgery and am licensed to practice medicine in the State of Massachusetts. I am in private medical practice in Brookline, Massachusetts.

3. Although I am a member of the American Society of Plastic and Reconstructive Surgeons, Inc. ("Society"), I am not employed as a medical doctor for the Society. I have never performed any medical service or treatment whatsoever on behalf of the Society in Utah or anywhere else.

4. I am not an agent, employee or representative of Dow Corning Corporation. I have never performed any medical treatment or service for Dow Corning Corporation in Utah or anywhere else.

5. I am not presently and never have been licensed to practice medicine in Utah. I have never advertised, maintained an office or otherwise transacted any business in the State of Utah. Further, I do not own, use or possess any real property situated in Utah.

6. I was appointed medical monitor for the MDX4-4011 Silicone Injection Study by agreement with the Federal Drug Administration and the Society for the purpose of screening potential patients for the said Silicone Injection Study.

Medical information for Celia Anderson was forwarded to Massachusetts from her physician for the purpose of obtaining my approval for Celia Anderson's voluntary entry into the Silicone Injection Study. Based on the information I received from Celia Anderson's physician, I approved her entry into the Silicone Injection Study.

7. My role in Celia Anderson's entry in the Silicone Injection Study was limited to review of medical information provided by her physician. That review was conducted in Massachusetts. I have never seen or communicated with Celia Anderson.

DATED this ____ day of July, 1987.

_____
Dr. Robert Goldwyn

SUBSCRIBED AND SWORN to before me this _____ day of July, 1987.

_____
NOTARY PUBLIC
Residing at:_____

My Commission Expires:

_____

SCMLRL54

ADDENDUM "C"

STATE OF ILLINOIS)
) SS.:
COUNTY OF COOK)

AFFIDAVIT OF THOMAS R. SCHEDLER

Thomas R. Schedler, being first duly sworn on oath, deposes and states:

1. I am the Executive Director of the American Society of Plastic and Reconstructive Surgeons, Inc. ("ASPRS").

2. ASPRS was founded in 1931, and is incorporated under the not-for-profit corporation laws of the State of Illinois. ASPRS has its headquarters and principal place of business in Chicago, Illinois. ASPRS is exempt from federal income taxation under Section 501(c)(6) of the Internal Revenue Code.

3. ASPRS has no office or employee in the State of Utah. ASPRS is not qualified to do business in the State of Utah, has not designated an agent for acceptance of service of process in Utah, has not contracted to supply services or goods in Utah, and has no telephone listing or bank account in Utah. ASPRS does not own, use or possess any real estate in Utah.

4. ASPRS does not practice medicine or manufacture, sell or distribute MDX 4-4011 or any drug or device in Utah or any state, and did not draft, prepare or distribute the consent form in issue.

5. ASPRS is a voluntary association comprising approximately 2,600 active members, who are practicing plastic surgeons in the United States and Canada.

6. The ASPRS membership meets once a year. The ASPRS annual meeting is held in various cities. The ASPRS annual meeting has never been held in the State of Utah.

7. Approximately 30 active ASPRS members reside in the State of Utah.

8. As part of my duties as ASPRS Executive Director, I attend meetings of various medical societies, public interest groups or government agencies throughout the United States. I have never represented ASPRS at a function in the State of Utah. For at least the past ten years, ASPRS has never been represented at a function in the State of Utah.

9. For at least the past ten years, ASPRS has conducted no educational symposia or seminars in the State of Utah.

10. ASPRS does not license, certify or accredit physicians or hospitals. Membership in ASPRS is not a prerequisite to the practice of medicine or surgery in any state.

11. ASPRS does not solicit applications for membership, but accepts applications from qualified physicians who are sponsored for membership by two ASPRS active members.

12. Applications for membership in ASPRS are submitted to the ASPRS office in Chicago, Illinois. When the membership file in Chicago is complete, including letters of reference and other supporting information, the application is reviewed in Chicago by the ASPRS Membership Committee. Favorable recommendations by the Membership Committee are presented to the ASPRS Board of Directors. If an application is approved by the Board, the

applicant's name is submitted to the assembled membership at the ASPRS annual meeting, and a favorable vote of 80% of those present and voting is required to admit an applicant to membership in ASPRS.

13. All membership dues are billed from and paid to the ASPRS office in Chicago, Illinois. In 1986, estimated total dues collected from all ASPRS members was $1,300,000. Estimated dues collected during 1986 from active members residing in Utah were $14,500.

14. ASPRS is governed by a 21-member Board of Directors. No directors reside in Utah.

15. My personal domicile and residence are in the State of Illinois.

Further Affiant saith not.

Thomas R. Schedler

SUBSCRIBED AND SWORN TO
before me this 2nd day
of July, 1987

Notary Public

My Commission expires September 12, 1989

CERTIFICATE OF SERVICE

I do hereby certify that on the 14th day of April, 1988, I cause four (4) true and correct copies of the Brief of Respondents ASPRS and Dr. Robert Goldwyn to be served upon the following:

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